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IN THE

Supreme Court of the United States

October Term, 1957
No. 601

NORTH AMERICAN AVIATION, INC., a Corporation,
Petitioner,

vs.

WANDA LEE HUGHES AND RANDALL L. HUGHES, a Minor, by His Guardian *ad Litem*, Harry Sutton,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, North American Aviation, Inc., a corporation, defendant in the District Court, prays that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, rendered on August 9, 1957 (No. 15,292), affirming a judgment of the United States District Court for the Southern District of California, Central Division, based upon the verdict of a jury, assessing damages against your petitioner in the sum of $125,000.00 for the alleged wrongful death of Fred L. Hughes, a United States Army pilot.

The Opinion of the Court Below.

No written opinion was filed by the District Court in connection with any phase of the litigation. The opinion of the Court of Appeals is not yet reported. A copy of the Opinion of the Court of Appeals is appended to the petition for writ of certiorari.

Jurisdiction.

Jurisdiction to review this case upon a writ of certiorari is conferred upon this Court under 28 U. S. C. 1254, Sub. 1.

The opinion of the Court of Appeals for the Ninth Circuit was filed August 9, 1957. A petition for a rehearing was filed on September 9, 1957 and was thereafter on September 25, 1957 denied.

Questions Presented.

1. In a suit against the manufacturer of a jet aircraft where the manufacturer's sole customer is the United States Air Force, manufacturing an aircraft according to United States Air Force plans and specifications, and where no evidence is introduced establishing any negligent act or omission on the part of the manufacturer in connection with the manufacture, construction or design of the aircraft, which thereafter crashes while under the control of an Air Force pilot, can the manufacturer be held liable?

2. Where the United States Court of Appeals in an unprecedented decision, without the citation of a single legal authority, created a striking innovation in the field of common law manufacturer's liability, imposing upon the manufacturer a virtual insurer's liability, without resort to the law of the highest court of the State of

California, is not the opinion in violation of the principles set down by this Court in the case of *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and *Hudson v. Moonier,* 304 U. S. 397?

3. Did not the United States District Court and the Court of Appeals commit an abuse of discretion in refusing to set aside the verdict and order a new trial to petitioner where the verdict was clearly against the weight of the evidence and plainly the result of passion, prejudice and sympathy?

4. Was it not clearly error, in a case where the Court of Appeals conceded that the true cause of the accident was a "mystery", to conclude that merely because the airplane crash *may* have been "due to a mechanical defect which developed while the machine was still in the air", that from that fact alone the manufacturer of an aircraft is to be held responsible in damages for the crash of an airplane under the control of a pilot over whom the manufacturer has no control?

5. Did not the Court of Appeals actually apply the doctrine of *res ipsa loquitur* in order to affirm the judgment of the District Court in utter violation of innumerable opinions of the California Supreme Court, particularly *La Porte v. Huston,* 33 Cal. 2d 167; *Zentz v. Coca Cola,* 39 Cal. 2d 167 and *Danner v. Atkins,* 47 Cal. 2d 327?

6. Did not the Court of Appeals fall into grievous error in refusing to consider any of petitioner's arguments or authorities, and did not the Court thereby deprive petitioner of due process of the law guaranteed by the Constitution of the United States?

Statement.

Jurisdiction was vested in the District Court by reason of diversity of citizenship, the plaintiffs being residents of the State of Ohio and the defendant being a resident of the State of Delaware. (28 U. S. C. 1332-a (1).)

Petitioner, North American Aviation, Inc., was the manufacturer of a jet aircraft known as the F86F, a single engine jet plane. The United States Air Force was the sole customer of petitioner and the plane was manufactured according to Air Force specifications.

The particular plane had been manufactured for a number of years. It was a complex piece of equipment containing approximately one million parts, and through the several years of its manufacture had undergone certain revisions in design. The plane was small, being approximately 37 feet in length and with a wing span of only 36 feet, but capable of exceeding a speed of 735 mph. The jet engine was manufactured by the General Electric Corporation.

Throughout the manufacture of the plane it is minutely inspected and checked, some 225 inspectors taking part in the inspection of the plane, its components and the various systems of the plane.

Upon completion, it was test flown and three minor squawks were discovered having relation to the operation of the plane at high speeds only. These initial operational squawks were checked off and corrected and the plane was accepted by the United States Army Air Force after an acceptance flight. No takeoff difficulty was encountered on either the test flight or acceptance flight.

Independently of petitioner, the Army Air Force had inspectors on the premises who made inspections of their own.

On December 18, 1953, the decedent, First Lt. Fred L. Hughes, an Air Force pilot with less than 38 hours of instrument flying time, for some unexplainable reason was ordered by his superiors to fly the plane in question from the Los Angeles International Airport to the Nellis Air Force Base at Las Vegas, Nevada. Under Air Force regulations, several types of instrument cards are issued to pilots, one a white card, requiring a minimum of 10 instrument hours a month. The evidence demonstrated that a pilot without a current white card was violating Air Force regulations in taking off with instruments. At the time of the flight in question, decedent did not have a current white card or instrument certificate. The evidence was uncontradicted that on the day in question, the weather was instrument weather, and that despite the failure of the pilot to have the proper white card auth-izing an instrument flight, he was cleared for such a flight.

While there were minor discrepancies in the testimony of the many witnesses relating to visibility, there can be no doubt about the fact that the flight was scheduled as an instrument flight, the pilot filed an instrument flight plan indicating an instrument flight, and the weather was classified as instrument weather. There was a low fog rolling in from the ocean, and shortly after takeoff the pilot and the plane were completely enveloped in the fog.

While there were minor conflicts relating to the precise happening of the accident, it was undisputed that the plane reached a height of no more than 100 feet. Shortly

thereafter the plane crashed. Whether the plane exploded just before it crashed or exploded after it crashed, when the gasoline tanks located on the wing tips struck the ground, was a matter upon which there was some conflict. It was uncontradicted that after the plane crashed to the ground, it caught fire and the pilot was instantly killed. The area was immediately roped off by Army authorities and thereafter a minute and detailed inspection of every portion of the plane was undertaken by a combined group of investigators from North American, the United States Army Air Force and from the General Electric Company, the manufacturer of the jet engine. After minute inspection of all of the remaining portions of the aircraft, it was concluded by all of the experts that there was no evidence to indicate any structural or mechanical flaw or defect in the plane. The evidence was uncontradicted that immediately prior to the takeoff on an instrument flight, it is necessary to run the jet engine on full power for at least 5 minutes to enable the gyro instruments to properly stabilize themselves. This is not true with a jet plane, however, where an instrument takeoff is unnecessary. In such cases, no warm up is necessary. The evidence was uncontradicted that the decedent, Lt. Hughes, for some reason did not sufficiently operate the jet engine prior to actual take off time to enable it to properly stabilize his instruments. It is imperative that the gyro horizon be in proper working order so that the pilot can tell where he is going when he is flying on instruments.

While respondents assert that there was evidence of negligence in the manufacture of the aircraft, they were not able in the trial court or in the Circuit Court to point out any negligent act or omission on the part of

North American which was in any manner a proximate cause of the crash of the plane.

To this day, no one has pointed to any evidence indicating any particular defect or flaw in this jet aircraft. No one has suggested that there was anything improper about the design of the aircraft. There is nothing to indicate that this aircraft was not constructed in absolute accord with United States Air Force plans and specifications. There is not one scintilla of evidence that there was any faulty inspection procedure or that anything done or omitted with reference to the inspection or manufacture of the aircraft proximately caused or contributed to the crash of the plane.

The District Court refused to instruct upon the doctrine of *res ipsa loquitur* and submitted the case to the jury upon the general duty of the manufacturer of a product that is either inherently dangerous or reasonably certain to be dangerous if negligently made, to give appropriate warning by label or otherwise of any known dangers which the user of the product ordinarily would not discover and to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended, including the duty of the manufacturer to make such inspections and tests of material obtained from a source outside the manufacturing plant, as ordinary prudence would indicate to be necessary. The jury returned a verdict in favor of the heirs of the decedent and the District Court denied petitioner's motion for a judgment notwithstanding the verdict, or for a new trial. At the time the District Court ruled on the motion for a new trial, the court stated: "I don't know on what theory the jury determined negligence in this case. I might be very frank in saying to counsel that

if I had been trying this case without a jury, I wouldn't have found for the plaintiff. In my opinion I think that the plaintiff would have to prove more than that an accident happened. *In my opinion I think that is all counsel proved, that an accident happened.*" [P. 878; Italics added.]

Further indicative of the District Court's reaction to the evidence is the following statement: "I am satisfied in my own mind regardless of what way I decide this case, that there will be an appeal. If I deny the motion, I am satisfied the defendant will appeal, and I would suggest to the defendant that they do appeal. I am satisfied if I granted the motion, the plaintiff will appeal, and I would recommend to the plaintiff that he appeal, so regardless of my decision, I think there is going to be an appeal in this case. *I think I will place the burden of the appeal upon the defendant rather than upon the plaintiff.* I don't feel justified in substituting my opinion for the opinion of the jury, *although I am very frank to say I don't see negligence.* . . ." [P. 879, Italics added.]

Upon appeal from the District Court's judgment, the Court of Appeals affirmed the judgment. In affirming the judgment, the Court of Appeals has written one of the most unique and unprecedented decisions to be found in any reported case. The Circuit Court merely set forth what it considered to be the petitioner's version of the facts, followed by a statement of the respondent's contentions with reference to the facts, set forth a summary of

the argument of both sides, a statement of the questions presented, and then concluded the opinion with an amazing paragraph, out of which stems a result so palpably erroneous that to deny a writ of certiorari would result not only in gross miscarriage of justice in the instant case, but in the countless cases involving airplanes which are now in litigation, as well as cases involving manufacturer's liability in general.

The setting for the bizarre conclusion is to be found in the opening language of the opinion where the Court of Appeals demonstrates its complete lack of understanding of the problem when it stated:

> "Man or machine—Which was responsible for the jet airplane crash. . . . If the man was responsible for the accident . . . reversal results. If the machine was defective, the manufacturer . . . was responsible. . . ." (App. p. 1.)

The amazing paragraph is as follows:

> "Although the true cause of the accident will probably remain a mystery, there appears substantial evidence to support the appellant's theory that the crash was due to a mechanical defect which developed while the machine was still in the air; in other words, a defect in the manufacture of the airplane for which the appellant was responsible."

The Court does not refer in its conclusion to the nature or character of the so-called substantial evidence supporting appellee's theory, nor is there any way that it can be ascertained.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Erroneously, Without the Citation of a Single Authority, Decided a Question of Utmost and Vital Importance to the Entire Aviation Industry and to the United States Government, the Sole Purchaser of the Jet Aircraft Involved, Without Regard to the Law of the State of California as Required by the Opinion of This Court in the Case of Erie v. Tompkins, 304 U. S. 64.

This Court, in the cases of *Erie v. Tompkins,* 304 U. S. 64 and *Hudson v. Moonier,* 304 U. S. 397, and subsequent cases, has laid down the basic principle that in a diversity case, the Federal Courts *must* follow the substantive law of the State.

In the case of *Hudson v. Moonier,* 304 U. S. 397, *supra,* this Court granted certiorari and reversed, stating: "The Court treated the question of the liability of the lessor as one of general law. The Court should have applied the law of Missouri, where the injury occurred."

Nothing is clearer than that the Court of Appeals failed to comply with the mandate of this Court in the case of *Erie v. Tompkins,* 304 U. S. 64, *supra.* The liability of petitioner as a manufacturer of the jet aircraft was a liability which was predicated upon negligence. Warranty was not involved and was eliminated in the trial court.

The doctrine of manufacturer's liability stems from such cases as *McPherson v. Buick Motor Co.,* 217 N. Y. 383, 11 N. E. 1050.

The doctrine is well crystallized in California.

Sheward v. Virtue, 20 Cal. 2d 410;

Stultz v. Benson Lumber Co., 6 Cal. 2d 688;

Judson Pacific Murphy, Inc. v. The Stove Co., 127 Cal. App. 2d 828.

There is not the remotest suggestion in any of these cases or in any California case, that a manufacturer's liability will be imposed merely because a mechanical defect developed after a machine went into operation. The statement of the Court of Appeals that there appears substantial evidence to support the appellee's theory that the crash was due to a "mechanical defect which developed while the machine was still in the air" is utterly inaccurate insofar as it purports to be a statement of the applicable law or a statement of law. Liability is imposed upon a manufacturer not because a mechanical defect developed while the airplane is in the air, but is imposed because there is evidence that there was some negligent act or omission on the part of the manufacturer which in some manner proximately caused the failure of the plane. A mechanical defect might well develop in the air from a myriad of circumstances entirely unrelated to any negligence on the part of a manufacturer.

The Court of Appeals has, in utter disregard for all of the recorded cases, treated the development of a mechanical defect in the air as synonymous with a defect in the manufacture of the airplane. No authority is cited nor can be cited for such a far flung and chimerical statement of the law of manufacturer's liability. The very use of the expression "man or machine" demonstrates the fallacy of the Court's position. A manufacturer's liability cannot be imposed based upon such a

rigid supposedly mutually exclusive approach. The opinion is predicated upon the concept that *either* the fault of the pilot or the fault of the manufacturer necessarily caused the crash. *Neither* may have been at fault and yet the plane may have crashed in what may well have been an unavoidable accident.[1]

II.

The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict With the Decisions of the Supreme Court of the State of California in the Cases of La Porte v. Huston, 33 Cal. 2d 167; Michener v. Hutton, 203 Cal. 604; Ybarra v. Spangard, 25 Cal. 2d 486; Danner v. Atkins, 47 Cal. 2d 327.

The Court of Appeals in reaching its perplexing and amazing result contained in the single concluding paragraph of its opinion, has *in effect* applied the doctrine of *res ipsa loquitur* although no mention is made of that obvious fact. The application of this doctrine was refused by the trial court and its application on appeal was urged to the Court of Appeals by the respondent.

Whatever the rules may be for its application in *other* states, it is clear that in California there are certain basic requirements which would in this case completely *foreclose* the application of the doctrine:

1. An accident must be of a kind which does not occur in the absence of someone's negligence.

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[1]In *Morrison v. Le Tourneau of Georgia*, 138 F. 2d 339 at 341, the Court (5th Cir.) pointed out: "The proof of negligence as to either defendant was too indefinite and inadequate. The evidence is as consistent with the theory of unavoidable accident as it is with either theory of negligence as to either defendant. . . ."

2. The accident must be caused by an agency or instrumentality within the exclusive control of the defendant.

3. The accident must not have been due to any voluntary action or contribution on the part of plaintiffs' decedent.

See:

Ybarra v. Spangard, 25 Cal. 2d 486, *supra;*

Zentz v. Coca-Cola, 39 Cal. 2d 436.

None of these requirements have been met.

At to requirement No. 1, the Supreme Court of California in *La Porte v. Huston*, 33 Cal. 2d 167, *supra*, was concerned with a case where the plaintiff was injured when he drove his automobile to a garage for a carburetor adjustment. The gear shift on the automatic transmission was in neutral. Plaintiff got out of his car and was watching the mechanic employed by the defendant work on the carburetor. While this work was in progress, the car suddenly lurched forward and struck the plaintiff. The Honorable Stanley N. Barnes refused to apply the doctrine of *res ipsa loquitur* and the Supreme Court of California affirmed this ruling, stating at page 170:

> "It was at least equally probable that the accident was caused by some fault in the mechanism of the car, for which defendants were not liable, as that it resulted from any negligent act or omission of the mechanic. Accordingly, it cannot be said that it is more likely than not that the accident was caused by the negligence of the defendants and hence the case was not a proper one for the application of the doctrine of res ipsa loquitur."

The second requirement of the doctrine relates to the *control* of the instrumentality. Obviously the jet aircraft was not under the exclusive control of the manufacturer at the time of the accident. The pilot and the *pilot alone* was the only one who could regulate the various instruments, the stick, and other mechanisms which obviously regulated the airplane in every phase of its movement, whether it related to the aircraft itself, the fuel system, the trim of the plane, or any of the other factors which may have in any manner involved the over all operation of the aircraft. The pilot alone and no one else was in control of the trim actuator setting, which later was found to have been *set improperly.*

The third requirement for the application of the doctrine of *res ipsa loquitur* in California requires that the decedent *must not have done anything himself which could have brought about the accident.*

There was abundant evidence that pilot error, negligent or *non-negligent,*[1] could cause the jet plane to crash. Pilot error negates the concept that there can be any *control* in the manufacturer. The following factors appear in the evidence:

a. A throttle burst, pilot produced, could cause a flame out, *i. e., a stopping of the jet power plant.*

b. The pilot could accidentally or intentionally cut the fuel supply.

c. The pilot could accidentally or intentionally hit the very sensitive stick and move it in the wrong

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[1]The striking significance of the problem relating to jet pilots is pointed up in the Journal of the American Medical Association, Vol. 165, p. 905 (Oct. 19, 1957) where it is stated: "The increasing number of unexplained jet aircraft accidents indicated a need for an experimental investigation of possible physiological factors leading to a pilot's incapacity for safe flying."

direction; for example, as the trial court himself pointed out, the pilot may have fainted, in which event there would be no negligence on the part of the pilot, and yet clearly no liability on the part of the appellant.

d. The pilot was a relatively inexperienced man in the flying of jet aircraft. *He had no current instrument white card.* He had not flown a jet airplane for almost two months before the accident. If he took off under visual conditions (which he might well have done since the fog bank had not yet reached the eastern end of the strip) and then tried to switch to instrument flying when he hit the fog bank, the evidence from skillful pilots was that this was a most hazardous procedure and could well affect the flight of the plane.

e. If the pilot took off with instruments in accordance with his flight plan, the uncontradicted evidence was that the plane was not warmed up sufficiently to stabilize the instruments needed for safe instrument flying. (No warm up is necessary with jet aircraft for mere visual flying.)

f. The evidence demonstrated that after the crash the trim actuator was *improperly* set. This could only have been the result of pilot error and comports with the actual physical facts at the point of impact and the angle of the plane.

g. Weather conditions were adverse. A fair inference might be that the pilot didn't warm up sufficiently because he hoped to become airborne *before* the rapidly approaching fog bank reached the westerly end of the runway.

h. Going into the fog bank the pilot had visual contact (even though the flight plan called for instrument flight) then had to switch to instruments—this transition at high speeds, may have caused the pilot to react unconsciously and affect the control stick.

i. Any blow on the throttle would affect the plane's operation; it can be moved backward or forward with very little effort.

The fact that the decedent was entitled to the presumption of due care for his own concerns in no manner eliminates the last mentioned requirement for the application of the doctrine and any such specious theory was forever laid to rest by California Courts in the case of *Spencer v. Beatty Safway Scaffold Co.*, 141 Cal. App. 2d 875 where, despite the fact that the Court held the plaintiff to be entitled to the presumption of due care, and thereby relieved of any charge of *contributory negligence*, the presumption would not be used to supply the third element set forth by the Supreme Court as a requirement for the application of *res ipsa loquitur*. The court stated at page 882: "Res ipsa loquitur does not apply. *It does not appear that the injury was not caused by a voluntary action of the appellant. Ybarra v. Spangard*, 25 Cal. 2d 486. From the events recited above, and from the allegation that the appellant went upon the bleachers to pull the cover down, it would not be irrational to conclude that his voluntary act was the cause." (Italics added.)

It is respectfully submitted that there is no reasonable basis for distinction between the *Beatty* case and the case at bar. The decedent was in sole and exclusive control of the jet aircraft. The facts have already been set

forth relating to his failure to have a current instrument card; the fact that he himself could have caused the throttle burst which in turn would cause the flame out; his unfamiliarity with the particular aircraft; the fact that he himself could have accidentally cut the fuel supply; the fact that he himself could have accidentally or otherwise hit the very sensitive stick, causing it to move in the wrong direction; the possibility that he may have fainted or blacked out; his relative inexperience with jet aircraft; his takeoff under circumstances involving an instrument flight where he had not warmed up the plane sufficiently to stabilize his instruments; and evidence that would indicate that the trim actuator was improperly set. Other possibilities have been set forth at an earlier point herein.

Any or all of these things, plus other conduct which, of course, would be unknown to anyone connected with this litigation, may have caused the crash in question.

These cases are in keeping with the fundamental principle that the presumption of due care cannot be used by a plaintiff to *establish* negligence. Thus the Court states in *Keiper v. Northwestern Pac. R. Co.*, 134 Cal. App. 2d 702, 286 P. 2d 47:

> "It is true that respondent is entitled to the presumption that deceased was exercising due care for his own safety, but as a corollary it does not follow that indulgence in this presumption leads to the conclusion, or presumption, or even inference, that appellant was negligent, or that this negligence was the proximate cause of death." (P. 711.)

See also: *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564, where this court held that the presumption of due care cannot be used to *establish* negligence on the part of a defendant.

III.

The Decision of the Court of Appeals Is in Conflict With the Decisions of Other Cases Decided by Various Circuit Courts of Appeal, i.e., the Cases of Williams v. United States, 218 F. 2d 473 (5th Cir.) and Morrison v. Le Tourneau Co., 138 F. 2d 339, Where the Fifth Circuit Court of Appeals Refused to Apply the Doctrine of Res Ipsa Loquitur to the Crash of Aircraft, and Particularly the Williams Case, Which Involved the Explosion and Crash of a Jet Aircraft.

The instant case, although it does not discuss the doctrine of *res ipsa loquitur,* must of necessity be predicated upon this doctrine since the evidence fails to reveal any negligence on the part of the defendant manufacturer. In the case of *Williams v. United States,* 218 F. 2d 473, a case decided by the Fifth Circuit, a jet bomber caught fire and exploded in midair with no survivors. Plaintiffs relied upon the doctrine of *res ipsa loquitur*. The Circuit Court rejected the application of the doctrine, saying at page 476:

> "In the final analysis, each case seeking to invoke this doctrine must stand or fall upon its own facts. *Res ipsa loquitur* is a rule based upon human experience, and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown. The concept presupposes that the defendant, who had exclusive control of the thing causing the injury, has superior knowledge

or means of information to that possessed by the plaintiff as to the cause of the accident. *It is not enough that the plaintiff show that the thing which injured him was in the exclusive control of the defendant, he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care.* Oftentimes experience in a particular situation is so uniform and well established that it is not necessary to prove this by extraneous evidence. However, such is not the case here. *We have no knowledge judicial or otherwise, of what would cause a jet airplane to explode in midair while in flight.* In the absence, as here, of evidence showing that such an accident would not occur except for negligence, there is no basis for a recovery. The trial court should have granted the Government's motion for judgment on this ground." (Italics added.)

The principle of this case is in full accord with many California cases.

For other Federal Court cases refusing the application of *res ipsa loquitur* in airplane cases, see:

Morrison v. Le Tourneau, 138 F. 2d 339 (5th Cir.);

Cohn v. United Air Lines, 17 Fed. Supp. 865;

Davies Flying Service v. United States, 114 Fed. Supp. 776.

IV.

The Writ Should Be Granted for the Further Reason That the Verdict Was so Palpably Contrary to the Evidence That It Cannot Be Sustained on Any Rational Grounds. It Was a Flagrant Miscarriage of Justice and the Refusal to Set It Aside Was a Clear Abuse of Judicial Discretion Which Should Be Corrected by This Court.

The jet plane in question was manufactured according to Army specifications and flown by an Army pilot. It was owned by the United States.

No case involving manufacturer's liability has come to petitioner's attention that has gone as far as the opinion of the Court of Appeals, barren as it must be of any applicable authority. It is contrary to the decisions of the State of California, of other Circuit Courts of the United States, as has been pointed out, and is in conflict with the decisions of this Honorable Court.

This Court has repeatedly held that where there is a complete absence of probative facts to support the conclusion reached, the error is reversible. A judgment cannot be predicated upon pure speculation and conjecture. In *Chicago M. & St. P. Ry. Company v. Coogan*, 271 U. S. 472, this Court said:

> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 524. When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the

bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pauling v. United States,* 8 U. S. 219, 221; *Patton v. Texas & Pacific Railway Co.,* 179 U. S. 658, 663; *Looney v. Metropolitan Railroad Co.,* 200 U. S. 480, 488; *St. L. & Iron Mtn. Ry. Co. v. McWhirter,* supra, 282 (33 S. Ct. 858); *St. Louis-San Francisco Ry. v. Mills,* 271 U. S. 344, decided May 24, 1926."

See also:

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 749, 90 L. Ed. 916.

Probably this Court in passing upon the liability of a manufacturer and in referring to the famous case of *McPherson v. Buick Motor Co.,* 217 N. Y. 383, 11 N. E. 1050, best stated the applicable principle as follows: *"There must be knowledge of a danger, not merely possible, but probable."*

Dalehite v. United States, 346 U. S. 15, at 42.

The record in this case is utterly devoid of any evidence that petitioner, North American, had any knowledge that there was anything wrong with the airplane in question, either possible or probable. On the contrary, the evidence indicates that North American had inspected this plane in every facet of its development from the time its manufacture was started until it was delivered. Each part was progressively inspected, the components and all of the systems. At least 225 inspectors were involved in these part by part inspections of the aircraft in question. There is no evidence to show that the defendant was negligent in connection with any of the inspections.

The duty of the manufacturer has already been adverted to, but more recently has been re-defined in the case of *Maryland Casualty v. Ind. Metal Products Co.*, 203 F. 2d 838 at 842 (8th Cir.), where the Court states:

> "It may be stated as a general rule that a manufacturer is required to exercise reasonable care in manufacturing an article which if carelessly manufactured, is likely to cause more than trivial harm to those who use it in the manner for which it is manufactured Restatement of Torts Sec. 395. However, the defendant is only required to exercise reasonable care, and the burden is on the plaintiff to show that the defendant has failed to exercise such care in one or more of the particulars in which reasonable care is required for the protection of those whose safety depends upon the character of the chattel."

If the true cause of the accident was a mystery, how can it possibly be said that the conduct of the pilot was non-contributory? There is no legal legerdemain nor resort to semantics which can solve the mystery more aptly posed, as to how the Court of Appeals in a situation where their own evaluation of the facts suggested that the true cause of the accident was a mystery, could still, as inherently in its opinion it must have done, concluded that the conduct of the deceased pilot was non-contributory. How can it be said that the crash was not due to some mechanical defect for which appellant North American could not be responsible, such as some latent and hidden defect contained within the engine itself which was built by General Electric Company and merely installed in the aircraft after being checked? There is not one scintilla of evidence that the check made of the jet

engine itself was not adequate or not in keeping with the standard of practice in the industry.

The law relating to the liability of a manufacturer who incorporates a component part, such as an engine, is well stated in *O'Rourke v. Day and Nite Water Heater Co.*, 31 Cal. App. 2d 364, where at page 370 the Court affirmed a judgment notwithstanding the verdict, holding that as a matter of law the manufacturer was required to exercise only ordinary care in connection with its examination of the component parts involved in the finished product. The court states at page 370:

> "The article in question, the safety pilot came to the respondent as a sealed unit. Its very nature precluded an internal inspection and any such inspection would have necessarily destroyed the adjustment of its parts, which was essential to its operation. In such a case as this the rule relied upon by the appellants does not require the making of inspections and tests of this complicated and delicate device which destroy the usefulness of the article.
>
> "We conclude that the rules in question did not require the respondent to make internal inspections and tests of this complicated and delicate device which came to it finely adjusted and sealed, and that under such circumstances such external inspections and tests as were possible were all that was required of it in the exercise of ordinary and reasonable care. There being no evidence of negligence on the part of the respondent, it follows that the action of the Court was correct."

Conclusion.

In the judgments below, the Court of Appeals and the District Court have decided a question of major importance to the entire aircraft industry and to the United States Government as the sole purchaser of military aircraft; decided it in a manner contrary to the settled decisions of the Supreme Court of the State of California and contrary to countless decisions from other Circuit Courts relating to the liability of a manufacturer. The record is devoid of any evidence to support the verdict. Only the trial judge's *misconception* of his own powers on a motion for a new trial have forced petitioner into the position in which it now finds itself. The verdict below was so plainly contrary to the evidence and the physical facts that it cannot be sustained on any rational grounds. The multiplicity of the methods by which the deceased pilot could have brought about the fateful crash of the aircraft of which he was in sole control, demonstrate the frailty upon which this judgment rests, and demonstrate the utter refusal of the Court of Appeals to follow the principles of law laid down in the California cases heretofore referred to. It is submitted accordingly that this Court should grant this Petition for Writ of Certiorari and should reverse the judgment below.

Respectfully submitted,

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Associate Counsel not members of this Court:
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DONALD RUPPE and
HENRY E. KAPPLER.

APPENDIX.

Opinion of United States Court of Appeals, for the Ninth Circuit.

North American Aviation, Inc., a corporation, Appellant, vs. Wanda Lee Hughes and Randall L. Hughes, a Minor, by his Guardian *Ad Litem*, Harry Sutton, Appellees. No. 15,292.

Aug. 9, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Orr, Lemmon, and Chambers, Circuit Judges.

LEMMON, *Circuit Judge.*

Man or machine—

Which was responsible for the jet airplane crash that caused the death of the pilot, whose widow and whose infant son recovered $125,000 from the manufacturer of the machine?

If the man was responsible for the accident, his widow and his son, plaintiffs below and appellees here, cannot recover, and reversal results.

If the machine was defective, the manufacturer—the defendant below and the appellant here—as responsible, and the judgment of damages must be affirmed.

The action was one for wrongful death. The appellant filed a motion for judgment notwithstanding the verdict or for a new trial. The lower court denied both motions, and gave judgment on the verdict. From that judgment the present appeal has been taken.

1. *The Stipulated Facts*

An F-86F aircraft, manufactured by the appellant, and piloted by the decedent, First Lieutenant Fred L. Hughes, crashed at the west end of the Los Angeles International Airport immediately after takeoff, at about 3:27 p.m., on December 18, 1953.

This aircraft had been delivered to the United States Air Force, after acceptance by the latter, and Lieutenant Hughes was flying it from the appellant's factory, located at the Airport, to Nellis Air Force Base, Las Vegas, Nevada, when the accident occurred.

The machine was completely demolished and the pilot instantly killed. The plane was airborne before it crashed.

In addition to these stipulated facts, each party argued that there were certain additional facts favorable to their respective contentions. Those additional facts will be stated below, under appropriate headings.

2. *The Appellant's Version Regarding Certain Additional Facts.*

The printed transcript of record in this case consists of 885 pages. Obviously, an independent summary of the evidence cannot be attempted here. Accordingly, we give below the parties' respective versions of *additional* facts not covered by the stipulation, *supra*. The appellant's version is given first.

The appellant's aircraft was known as the "Jes F-86F." Although there are numerous landing strips at the Airport, where the crash occurred, the particular strip involved here was about 8500 feet long, was paved, and ran in an easterly and westerly direction.

The evidence is uncontradicted that the weather at the time of the accident was poor. Visibility was obscured by reason of a heavy fog bank which was rolling in from west to east. Flight visibility was described as "zero," and "instrument weather" prevailed. The weather was so bad that no "Army Air Force acceptance flights" were performed on the day in question, and some 18 scheduled flights were canceled.

At the time of his death, the pilot was 25 years of age. He had acquired a total flying time of 627 hours and 5 minutes, of which about 279 hours were spent as a student. His total flying time in the jet aircraft was "comparatively slight," and most of his jet plane experience was in *visual* rather than instrument flying. As of June, 1953, he had only 137 hours of instrument flying.

The Army Air Force issued to its pilots two types of cards: a green card, "which is something like a rank," and requires at least 500 actual instrument flying hours; and a white card, "which permits no element of discretion on the part of the pilot; it merely shows a basic instrument qualification." The decedent never held a *green* card, although he did possess a white card, which was *not current*.

The aircraft contained about 1,000,000 parts, and was capable of exceeding the speed of sound, 735 miles per hour. A jet aircraft requires no warm-up as do other planes *when the flight is conducted under visual rules.* When, however, the flight is to be on *instruments,* the motor must be warmed up for at least *five minutes,* to stabilize certain instruments.

Thousands of these planes had been delivered, and there was no evidence that any of them had ever had any trouble.

Throughout the course of the manufacture of the plane it is minutely checked and inspected in all of its various systems. On the first flight it was discovered that there were three minor "squawks," none of which had anything to do with the take-off or operation at low speeds. Take-off speed was only 110 knots an hour. All the "squawks" were inspected and checked off or corrected.

Although the pilot who flew the Army Air Force acceptance flight was an employee of the appellant, this method of operation had long been in existence between the appellant and the Government.

In addition to the appellant's inspectors, the Army Air Force also has inspectors of its own, who make certain independent inspections. Altogether, there were three inspections by the appellant's flight inspector.

The fatal flight was scheduled for instrument take-off, and the decedent had filed a flight plan with the tower. He was seen to inspect the plane, climb into the cockpit, start the motor, and taxi the machine to the east end of the runway. There is considerable smoke connected with a jet plane. The pilot stopped the machine there for a very short time, probably less than a minute. He then took off, as the fog bank was moving in and covering the west end of the runway.

The take-off appeared to be normal. One witness described the plane's height as 5 to 25 feet at the moment that it disappeared into the fog bank. At a point about 125 feet west of the west end of the runway, the jet crashed to the ground. A fire developed at that point immediately, and spread westerly across Lincoln Boulevard, burning the grass and dirt, and then searing the asphalt surface of the highway. After crashing, the

plane proceeded in a westerly direction, tore through the fence on the east side of the Boulevard, went across the highway, broke through the fence on the westerly side of the boulevard, and proceeded about 200 feet into a vacant field, where the major portions of the plane-fuselage, door assembly, engine, and other larger parts—were found. At the moment that the plane struck the ground there was an explosion, followed immediately by a fire.

William L. Pitts, procurement quality control inspector of the Air Force, immediately took over to "protect the interests of the Government." A team of experts from the appellant, the Army Air Force, and General Electric co-ordinated their activities in an effort to determine the cause, if possible, of the crash.

The appellant produced all of the available experts who participated in the investigation of the accident. They agreed that it was not due to any failure of the aircraft "or its component parts."

The evidence that "pilot error," negligent or *non-negligent*, could cause the jet plane to crash. The appellant lists nine [causative?] "factors" that it says appear in the evidence, including the fact that the pilot was a relatively inexperienced man in the flying of jet aircraft.

3. *The Appellee's Version of Certain Additional Facts.*

The pilot was a veteran of 100 combat missions flown in jet aircraft in a foreign theater. He flew 144 hours combat time. Among his decorations were the Distinguished Flying Cross and Oak Leaf Clusters.

His experience included combat in a F-86F airplane, the same type of machine in which he was killed. He had

been qualified for instrument flight for three years, and had been an instructor in instrument flying.

From April 19, 1953, to May, 1953, he was suspended from flying for unspecified physical reasons. Such suspenson may result because the flier has developed a common cold.

The weather conditions were normal for the Los Angeles International Airport. Visibility was officially fixed at one-half mile. The air traffic moved all afternoon both before and after the accident without interruption. Hundreds of planes of every type, including military, private, and commercial, came and went on schedule. The only flights canceled because of weather were the test flights of new military aircraft manufactured by the appellant, because of an Air Force regulation prohibiting test flights unless visibility is three miles or more.

Neither the instruments nor the jet engine needed to be warmed up. Some of the witnesses used the expression "five-minute warm-up" in connection with an instrument flight, but the matter was clarified by the appellant's own chief production test pilot, whose testimony indicated that the warmth of the engine has nothing to do with the matter, since the instrument in question is the vertical gyro horizon, which is operated electrically and is not dependent upon the operation of the engine. It takes five minutes for gyros "to come to speed."

The plane was in the exclusive possession and control of the appellant until Lieutenant Hughes stepped into the cockpit.

There was evidence of carelessness in the process of manufacturing and inspecting the airplane.

The take-off was normal and at full power, and the plane was last seen in an attitude of climb.

There is evidence that there were a "flame-out" an explosion in the air, a fire in the air, and then a crash.

The opinions of the experts, to the effect that the crash was not due to any defect in the aircraft, "had no affirmative foundation, but were based upon a failure to find evidence of mechanical failure."

4. *The Questions Presented*

The appellant sets out four Specifications of Error, which may be summarized as follows:

1. The evidence did not support the judgment;

2. There was no evidence of appellant's actionable negligence;

3. There was no evidence that any negligence of the appellant was the proximate cause of death;

4. The trial court erred in denying the appellant's motions for judgment n.o.v.

The appellee, on the other hand, states—and we believe correctly—that "In reality there is only one question which is whether there is evidence to sustain the verdict of the jury."

5. *Summary of the Appellant's Argument*

The evidence fails to establish any "actionable negligence" on the appellant's part.

Although the appellees contend that the appellant was guilty of negligence in designing, manufacturing, "fabricating," and servicing the jet aircraft, they produced "not one scintilla" of evidence that there was any defect in this

particular aircraft, or that there had ever been any defect or defects in any other machine of similar type manufactured by the appellant, which would indicate negligence in design or fabrication.

Though conflicting in minor points, the testimony "demonstrated" that a plane used by the Army for many years and manufactured by the appellant, crashed while being operated by a "relatively inexperienced" jet pilot "having no connection with appellant."

The weather was "bad" and "foggy," "and was admittedly instrument weather." The pilot had no current instrumer standing, although he was presumably attempting to fly with instruments.

It is only by resort to the doctrine of *res ipsa loquitur* that the verdict and judgment can be upheld, despite the fact that the trial court properly refused to apply that doctrine.

6. *Summary of the Appellees' Argument*

A conflict appears at almost every point that the appellant's brief has treated as material. In each instance it must be assumed that the version favoring the verdict is the true one.

Foamite was found on part of the electrical system as the plane neared final assembly, indicating a fire. The parts affected by the fire were not replaced or inspected for damage after the fire. This is indicated by the presence of the foamite, "and that the only thing required by the inspector was to clean it off."

Here is one of the ways in which the jury might have considered the evidence to reach its verdict:

After take-off, the plane was airborne with wheels and flaps up and doors closed over the wheel wells. It was in an attitude of climb, but not climbing very fast. "This suggests trouble." A possible and perhaps likely source of the trouble is a broken or leaking fuel line.

The pilot may have had trouble with the flight control system, and recognizing a loss of power, sought to switch to the emergency system. Before this could be accomplished, the leaking fuel may have been ignited by a spark from the defective wiring or otherwise.

The pilot then "undoubtedly" lost control, probably because of an "explosion into the cockpit," and possibly because of the loss of the electrical hydraulic system, or both, and a crash followed.

The evidence is clearly indicative of mechanical failure, which the circumstances indicate is the fault of the manufacturer. Negligence in manufacture and inspection is evidenced by the signs pointing to a fire in the fuselage during fabrication. There being no evidence that the cause was discovered or rectified or that any effort was made to do so, the possibility of its happening again may be inferred. Such a fire could well be the proximate cause of the accident.

A plume of smoke rose 300 feet in the air—a certain indication of an explosion.

The appellant's supposition that the wing tanks exploded on contact with the ground is not supported by the physical evidence, a large part of which points to mechanical trouble *in the air.*

The jury was well supported by substantial evidence of all types in a conclusion that *mechanical failure* caused the accident—flame-out, explosion, or fire, or all three.

There was no evidence of possible pilot error.

7. Conclusion

Since, as we have seen, the parties correctly agree that the problem here is factual, we have summarized somewhat fully the respective interpretations of the evidence.

Although the true cause of the accident will probably remain a mystery, there appears substantial evidence to support the appellee's theory that the crash was due to a mechanical defect which developed *while the machine was still in the air;* in other words, a defect in the manufacture of the airplane, for which the appellant was responsible.

Accordingly, the judgment is

Affirmed.

(Endorsed:) Opinion. Filed Aug. 9, 1957.

Paul P. O'Brien, Clerk.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1957

No. 601

NORTH AMERICAN AVIATION, INC., a Corporation,

Petitioner,

vs.

WARDA LEE HOOKER AND RAYMOND E. HOOKER, a Minor, by His Guardian ad Litem, Harold Sorgen,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1957

No. 601

NORTH AMERICAN AVIATION, INC., a Corporation,
Petitioner,

vs.

WANDA LEE HUGHES AND RANDALL L. HUGHES, a Minor, by His Guardian, *ad Litem*, Harry Sutton,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Every One of the Questions Presented to the Supreme Court by Petitioner in Its Petition for Certiorari Has a False Premise.

It has been Petitioner's consistent policy to ignore all of the evidence which conflicts with Petitioner's interests. Although the evidence of negligence in manufacture has been specifically pointed out by Respondents twice in briefs and also in oral argument, Petitioner prefers to pretend that it is not there, as in question number 1. Since the jury could and did conclude from this evidence that Petitioner was negligent, Petitioner's hope is that some appellate court will reweigh the evidence and come to a contrary conclusion, as suggested in question number 3.

As far as the law is concerned, the United States Court of Appeals simply decided that the evidence on all questions was conflicting, but sufficient to sustain the verdict. This is not an innovation in any field of the law, as assumed in question number 2. It does not conflict with the decisions of the Courts of California or with those of other Courts of the United States. It will be of little or no value as a precedent.

In order to pose legal issues on appeal, Petitioner has erected a straw man in question number 5 by supposing that the judgment has been sustained by application of the doctrine of *res ipsa loquitur*. There is no room for speculation as to the law applied because the Court of Appeals held that there was substantial evidence to support Respondents' theory that the crash was due to "a defect in the manufacture of the airplane, *for which Petitioner was responsible.*" (Emphasis added.)

The Court of Appeals held that there *was* substantial evidence that mechanical defect caused the crash. This does not leave the uncertainty which is the false premise of question number 4. There is nothing to indicate that the Court of Appeals did not give full consideration to every authority cited and every argument made before it, as assumed in question number 6. The guarantee of due process of law does not require the Court of Appeals to discuss arguments of counsel in an opinion or even to write an opinion.

The Court of Appeals noted in its decision (page 7 of the Appendix to Petition for Certiorari) that the four questions presented to that Court by Petitioner boiled down to one which was whether the evidence sustained the verdict of the jury. The Court of Appeals held that it did. The questions now presented to the Supreme Court

are subject to the same analysis and, therefore, fall into a category of cases which the Supreme Court has long since refused to review.

II.

Petitioner's Statement Which Purports to Be a Statement of Fact, Is Very Substantially Erroneous.

Until First Lieutenant Hughes stepped into the cockpit of the plane, it had been under the exclusive control of the manufacturer. Petitioner manufactured the airplane, tested it for the Air Force accepted it for the Air Force [R. 313, 314, 320, 505]. The Army Air Force had inspectors on the premises, but on a surveillance basis down in the detail and major assembly departments, but not in the final assembly [R. 366-367]. This is important because an electrical fire occurred in the fuselage of the airplane in final assembly where there were no Air Force inspectors [R. 367]. Further reference to this incident appears below.

Petitioner's assertion that First Lieutenant Hughes had only 38 hours of instrument flying time is contrary to fact. In the Court of Appeals Petitioner stated that Lieutenant Hughes had 137 hours of instrument flying time (App. Op. Br. p. 4). Respondents agreed that this was correct and were then bitterly attacked in the Reply Brief of Petitioner. The 38 hour figure fails to take into account approximately 100 hours of instrument flying time credited to Lieutenant Hughes while he was in training. Exhibit 1 is a record of his flight experience and this shows a total of 132 hours and 25 minutes of instrument flight experience. The Court of Appeals correctly notes in its decision that Petitioner claimed that Lieutenant Hughes had 137 hours of instrument flying (see Ap-

pendix to Petition for Writ, p. 3). By way of comparison, it appears that test pilot Kinkella, a man of unquestioned competency, had 150 hours of instrument time [R. 540]. This attack on decedent's instrument flight experience is unconvincing.

The opinion of the Court of Appeals summarizes the conflict on the question of the pilot's experience (Appendix to Petition for Certiorari, p. 5). He flew 100 combat missions in jet aircraft in a foreign theatre [R. 103, 108, 132, 140] and had 144 hours of combat time [R. 143] and received decorations including the Distinguished Flying Cross and Oak Leaf Clusters [R. 108, 112]. Decedent acted under orders from the Army Air Force which would seem to be best qualified to judge his competency to do as he was ordered.

The debate on the pilot's experience is reduced to insignificance by Petitioner's concession that decedent was entitled to the presumption of due care (See Petitioner's Opening Brief in the Court of Appeals, pp. 35-37; and Petition for Certiorari, p. 16). Suffice it to say that the jury obviously did not find that inexperience caused the pilot' death and that the Court of Appeals found substantial evidence that the cause was mechanical failure.

The evidence is not "uncontradicted" that the weather was instrument weather (see Appendix to Petition for Certiorari, p. 6). Nine pages of text and Appendix in Respondents' brief in the Court of Appeals were devoted to discussion of the condition of the weather which Respondents pointed out was good at the time of the accident and normal for the Los Angeles Airport. The conflict in the evidence on this point was there pointed out with detailed reference to the record. The condition of the weather was a question for the jury. The deceased pilot

did have an instrument clearance for take-off, but it was pointed out by witnesses that instrument clearance would be required if instrument weather was expected at any point between the place of take-off and destination. Again, this conflict was for the jury to resolve and obviously the jury did not consider that the weather was responsible for the pilot's death.

Petitioner states the case most favorably to itself in saying that there was some conflict as to whether the plane exploded before or after it crashed. The evidence established a flame-out,[1] followed by an explosion in the air[2] and that the plane was afire in the air.[3] It is, therefore, not true that the evidence is "uncontradicted" that

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[1]The incident report which was admitted without objection reads:

"Subsequent reports from the City Operations personnel, from North American Aviation supervisors and from the City Fire Department personnel indicate the aircraft, a jet, had an apparent flame-out at approximately 100 feet altitude . . ."

Test Pilot Frank C. Smith testified:

". . . I lost sight of it in the fog, and we were returning back into the lounge area, and we heard the engine stop with an explosion immediately, and we looked out to the area and saw the black smoke coming up through the fog" [R. 524].

[2]Patrick H. Rogers testified:

"It was air-borne at the time I seen it, it was air-borne about 25 to 40 feet, and just—well, it hadn't even got to the end of the runway when there was a loud explosion and a big burst of flame, 25 to 40 feet off the runway" [R. 180].

[3]Patrick H. Rogers testified:

"The Court: When you first saw this airplane, you saw a flash?

The Witness: Just a great big ball of fire.

The Court: It was in the fog then, was it?

The Witness: It was air-borne in the fog" [R. 181].

Robert E. Callagy testified that when he first saw the plane it was air-borne and on fire [R. 186-187].

the plane caught fire after it crashed or that the pilot was then killed. The time of death of the pilot was not established and it is equally as possible that he was killed by the explosion in the air as by the crash to the ground.

The evidence was not "uncontradicted" that decedent did not operate the jet engine long enough to stabilize his instruments. The gyro horizon was the only instrument which needed to be stabilized and this required five minutes. Analysis of the testimony of the witnesses shows that not less than four minutes and forty seconds expired after the jet engine was turned on and before the plane started down the runway [R. 400, 406, 411, 414, 415, 425, 428]. The time necessary for the take-off supplies the balance of the required five minutes.

Furthermore, it was established that the gyro horizon was an *electrical* instrument which is not in any way dependent upon the running of the jet engine [R. 456]. On pages 10 and 11 of Respondents' brief in the Court of Appeals, Respondents pointed to the evidence in the record which showed that this instrument had time to stabilize.

Why doesn't Petitioner point out that there was an *electrical* fire in the fuselage of the plane in the course of manufacture? The evidence of this fact was as follows:

> "Q. . . . Would you go back to L-4? I overlooked a couple of items. Would you read No. 3 on that, 89, item 89 on that L-4? A. Due to use of foamite cleaner, it looks like, or due to use of foamite, clean all relay boxes and terminal connectors, such as reverse current relay, field current relay, armament relay, and so on.
>
> Q. What does that mean, Mr. Clayton? A. The only reason there would be any foamite in there would be if we had an electrical fire in the assembly.

Q. That means they had a fire there and put it out, isn't that right? A. It reads that way.

Q. Isn't that the final check-out sheet, squawk sheet, for the electrical system? A. No. This is down in the final assembly. This isn't the final squawk sheets of the airplane.

Q. This is the final assembly? A. That's right." [R. 810-811].

From the unexplained presence of this electrical fire and the callous indifference of the manufacturer's inspector (who did not require a check of the cause of the fire or a check of the wiring, but only that evidence of the fire be erased) and the fact of the accident itself,[4] the jury was warranted in concluding that Petitioner was careless in manufacturing the plane.

It is not true, as asserted by Petitioner, that Respondents were unable to point to negligence of Petitioner which was in any manner a proximate cause of the crash, or that there was no evidence pointing to a flaw in its manufacture. Again, on the contrary, the evidence does show a fault of inspection and manufacture and in a potent potential source of trouble. The wiring, if faulty, is likely to be responsible for malfunction of electrically operated fuel pumps causing a flame-out, and also for an electrical fire while the plane is in the air, igniting fuel or fumes to cause both explosion and fire in the air. Such substantial evidence, even if it is circumstantial, is evidence of negligence sufficient to support a jury verdict.

The trial court's instruction on the duty of a manufacturer of a potentially dangerous instrumentality was proper and the jury had the duty of weighing the circumstantial

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[4] *Sullivan v. Shell Oil Company* (C. A. 9, 1956), 234 F. 2d 733.

evidence submitted to it. The jury did determine that the manufacturer breached its duty. The Court of Appeals found that there was "substantial evidence" to support the verdict.

Whether the trial judge would have reached the same conclusion from the same evidence is of no consequence. Suffice it to say that regardless of his personnal appraisal of the evidence, he was steadfast in his judgment that there was sufficient evidence to go to the jury. Of all of Petitioner's quotations from comments of the trial judge, only one line is of real importance:

> "I don't feel justified in substituting my opinion for the opinion of the jury." [R. 878].

As this Court has said of the duty of both trial and appellate courts:

> "Courts are not free to set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."
>
> *Tennant v. Peoria and P. U. Ry. Co.* (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

The opinion of the Court of Appeals follows the law that the facts are for the jury to determine. The jury, having done so on substantial evidence, the result is not to be upset by the trial or appellate courts. The jury's conclusion is sound, reasonable and just. To ascertain the nature and character of the substantial evidence which supports the verdict, Petitioner has but to read the whole record, not just the testimony favorable to Petitioner.

III.

Writ of Certiorari Should Be Refused Because the Case Does Not Involve Questions of Public Importance.

As noted above, Petitioner is primarily interested in a review of conflicting evidence and all of the questions presented are predicated upon an assumption or assertion that there is no evidence to sustain the jury verdict. It has long been the declared policy of the Supreme Court to refuse to review a conflict or the sufficiency of the evidence.

N.L.R.B. v. Pittsburgh Steamship Co. (1951), 340 U. S. 498, 95 L. Ed. 479, 482, 483;

General Talking Pictures Corp. v. Western Electric Co. (1937), 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849;

United States v. Johnson (1925), 268 U. S. 222, 227, 69 L. Ed. 925, 926.

The questions of law which Petitioner asserts are involved do not appear from the decision itself, but are assumed by the Petitioner to underlie the decision. If such were the case, further review by the Supreme Court is only of importance to the parties to the litigation. The decision plainly states that the only question involved is the sufficiency of the evidence. No question of conflicting precedent is presented; so the case is entirely lacking in public interest or importance. The policy of the Supreme

Court not to grant certiorari in such cases is well stated in the following decisions:

Rutz v. Sioux City Cemetery (1954), 349 U. S. 70, 99 L. Ed. 897, 901;

Magnum Import Co. v. DeSpoturno Coty (1923), 262 U. S. 159, 163 L. Ed. 922, 924;

Layne and Bowler Corp. v. Western Well Works, Inc. (1922), 261 U. S. 387, 393, 67 L. Ed. 712, 714.

IV.

Petitioner's Arguments in Support of Reasons for Granting Writ of Certiorari Are Without Sound Legal Foundation.

A. The Doctrine of Manufacturer's Liability as Recognized by California Law Has Neither Been Disregarded Nor Extended by the Decision of the Court of Appeals.

Contrary to the contention of Petitioner, the Court of Appeals based its decision upon three factors: (1) There was substantial evidence that the accident which caused the pilot's death was caused by mechanical defect; (2) There was substantial evidence that this resulted from a defect in the manufacture of the airplane and (3) There was substantial evidence that Petitioner was responsible for this defect, which is to say that it was negligently responsible.

The law of manufacturer's responsibility in California is substantially the same as established in *McPherson v. Buick Motor Company* (1916), 217 N. Y. 382, 111 N. E. 1050, 65 C. J. S. 629. The principle is that if a manufactured article is the kind of article which will cause more than trivial harm if carelessly manufactured the manufacturer must use reasonable care in manufacturing

it. The Court said that there must be knowledge of danger, not merely possible, but probable.

This means that there must be knowledge that the article is the kind of thing which will be harmful if not carefully manufactured. Everyone knows that an airplane of any kind is such an article. Even Petitioner knows this.

Applying the law to this case, the question is whether Petitioner did exercise reasonable care in manufacturing the aircraft in question. This is a question of fact which the jury resolved against the Petitioner upon the evidence already noted.

Fairly appraised, the opinion of the Court of Appeals is not susceptible to any inference that the Court sanctioned holding Petitioner liable upon any ground except Petitioner's own negligence in the manufacture of the airplane.

B. There Is No Conflict Between the Opinion of the United States Court of Appeals and the California Decisions Involving the Doctrine of Res Ipsa Loquitur.

In some states it has been held that it is a question of law as to whether the circumstances do or do not warrant application of the doctrine of *res ipsa loquitur*. This is not the law of California.

The law of this State is well expressed in *Sloboden v. Times Oil Co.* (1956), 145 Cal. App. 2d 197, 302 P. 2d 34.

> "*Res ipsa loquitur* is based in great degree on probabilities; it is a simple, understandable rule of circumstantial evidence with sound background of common sense and human experiences rather than rigid legal formula designed largely for exclusionary purposes."

1. IT IS FOR THE JURY TO DETERMINE WHETHER EACH OF THE CONDITIONS NECESSARY TO BRING INTO PLAY THE DOCTRINE OF RES IPSA LOQUITUR IS PRESENT.

As stated by the California Supreme Court in the recent case of *Seneris v. Haas* (1955), 45 Cal. 2d 811, 291 P. 2d 915,

> ". . . The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved. (citing cases.)"

The doctrine is applicable if it can be said that in the light of common experience or from evidence in the case, the accident was more probably than not the result of defendant's negligence. (*Zentz v. Coca-Cola Bottling Co.* (1952), 39 Cal. 2d 436, 247 P. 2d 344.) However:

> ". . . The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities.
>
> "In order that a plaintiff be entitled to the benefit of the doctrine of *res ipsa loquitur*, he need not exclude every other possibility that the injury was caused other than by defendant's negligence." (Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183, 194-198.)

In *Bauer v. Otis* (1955), 133 Cal. App. 2d 439, 443, 284 P. 2d 133, the Court pointed out:

> "The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it."

2. The Doctrine of Res Ipsa Loquitur May Be Relied Upon to Support a Judgment Although No Jury Instruction Is Given.

Jaffke v. Dunham (1957), 352 U. S. 285, 1 L. Ed. 2d 314;

Rogers v. Los Angeles Transit Lines (1955), 45 Cal. 2d 414, 289 P. 2d 226;

Rose v. Melody Lane (1952), 39 Cal. 2d 481, 247 P. 2d 335.

3. The Accident Was of a Kind Which Does Not Occur in the Absence of Someone's Negligence.

The F80 jet plane delivered to Lt. Hughes was not an experimental model [R. 460, 479]. This particular type of plane had been manufactured by Petitioner for four years [R. 460]. Thousands had been delivered to the Army [R. 330]. A jet plane is no more dangerous than a prop plane [R. 325-326].

It is an extraordinary event for a jet to have a flame out, to explode or to burn upon take-off [R. 328, 469-470, 479, 626-627].

Test pilot Annis had flown three to four thousand flights in F80's without experiencing flame out on take-off or fire or explosion [R. 479]. He had never heard of a plane exploding during take-off [R. 469-470].

The case of *La Porte v. Houston* (1948), 33 Cal. 2d 167, 199 P. 2d 665, is distinguished from the instant case by the fact that there was nothing that the defendant *could* have done to cause the accident.

4. The Condition Requiring Exclusive Control in Defendant Is Satisfied.

The requirement of control is not an absolute one. The fact that the accident occurred sometime after Petitioner relinquished physical control of the instrumentality which caused the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by Respondents' decedent or some third person or its condition otherwise changed after control was relinquished by Petitioner.

Zentz v. Coca-Cola Bottling Co., supra;

Nungary v. Pleasant Valley etc. Assn. (1956), 142 Cal. App. 2d 653, 300 P. 2d 285;

Burr v. Sherwin Williams Co. (1954), 42 Cal. 2d 682, 268 P. 2d 1041.

It is the control of the instrumentality by defendant at the time of the negligent act which satisfies the control element.

Rohar v. Osborne (1955), 133 Cal. App. 2d 345, 284 P. 2d 125;

Fields v. Oakland (1955), 137 Cal. App. 2d 602, 291 P. 2d 145;

Baker v. Goodrich Co. (1953), 115 Cal. App. 2d 221, 252 P. 2d 24;

Hoffing v. Coca Cola Bottling Co. (1948), 87 Cal. App. 2d 371, 197 P. 2d 50;

Escola v. Coca Cola Bottling Co. (1944), 24 Cal. 2d 453, 150 P. 2d 436;

Liggett and Myers Tobacco Co. v. De Lape (C. C. A. 9th, 1940), 109 F. 2d 598;

Michener v. Hutton (1928), 203 Cal. 604, 265 Pac. 238.

The evidence in this case is clear and without contradiction that the Petitioner had full physical control over the jet plane until the moment when Lt. Hughes climbed into the cockpit. He had physical control of the instrumentality only for a few minutes before the accident. After Lt. Hughes climbed into the cockpit and until the moment when the aircraft entered the obscuration at the far end of the airstrip there was no change in the condition of the aircraft.

There is no evidence that the pilot improperly handled the instrumentality. There is a presumption which is evidence in the case that he exercised all due care (Code Civ. Proc., Sec. 1963).

5. THE ACCIDENT COULD NOT HAVE BEEN DUE TO ANY VOLUNTARY ACTION OR CONTRIBUTION ON THE PART OF THE DECEASED PILOT.

Respondents agree that an element of the doctrine of *res ipsa loquitur* is lack of contribution. However, contribution is a question of fact to be resolved by the jury. (*Seneris v. Haas* (*supra*), p. 823 "We are of the opinion that the jury, under appropriate instructions, should have been permitted to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* were present.")

The case at bar is not governed by the case of *Spencer v. Beatty Safeway Scaffold Co.* (1956), 141 Cal. App. 2d 875, 297 P. 2d 740. The distinction is that there was

affirmative evidence that Spencer contributed to the accident. The Court said:

> "As proof that negligence of respondents did not cause appellant to fall, it is recalled that he had for eight months been familiar with the method of operating the bleacher, and had been the chief actor in its operation. He had never discovered anything out of order. On the contrary, *he had abused the plyboard by standing on the lid which was not designed to support a man's weight.* Such practice may have caused a warping of the plyboard and thus have added to the friction of the cable and caused it to be immobilized." (P. 882.)

The record together with the disputable presumption of due care which Petitioner does not contend was rebutted permits "a reasonable inference that it (the aircraft) was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff. . . . ." *(Escola v. Coca-Cola Bottling Co.* (1944), 24 Cal. 2d 453, 458, 150 P. 2d 436.)

6. THERE WAS NO EVIDENCE OF POSSIBLE NON-NEGLIGENT PILOT ERROR.

Since there was substantial evidence that the accident was caused by mechanical failure, the jury could have so determined. To the extent that such a determination supports the verdict, it must be assumed on appeal that the jury did so decide.

In fact the Respondents' case insofar as it relates to evidence of mechanical failure can well rest right there. But Petitioner has listed supposed possibilities of pilot error. They are characterized as non-negligent because in the circumstances there is no evidence of pilot negli-

gence. Moreover, there is a presumption with the weight of affirmative evidence against negligence of the pilot and evidence to the contrary merely raises a question of fact which has been adversely resolved against Petitioner. Just to clear the atmosphere on this subject the contentions of Petitioner commencing at page 14 of its petition are treated seriatim.

(a) A pilot induced throttle burst is absolutely precluded because this never happens on take-offs [R. 471-472].

(b) The testimony is overwhelmingly to the effect that the pilot could not accidently cut the fuel supply and that to do so intentionally would be suicide [R. 474, 476, 478]. No such speculation can be indulged because of the presumption that the pilot acted with due respect for his own safety (Code Civ. Proc., Sec. 1961).

(c) The hypothesis that the pilot might "hit" the stick and move it in the wrong direction is preposterous. His life depends upon his hold on the stick and his experience was such as to eliminate any danger of a deliberate turn toward the ground. He was last seen with flaps and wheels up in proper attitude of climb [R. 564].

(d) Nothing more need be said about the experience of this pilot. There is no reason to suppose that the pilot took off on visual flight and switched to instruments, nor is it established beyond a jury question of fact that he lost visual contact with the ground at any point. At the same time it is equally consistent with the evidence to suppose that he was on instruments from start to finish and that his instruments were warmed up and perfectly functioning.

(e) As before pointed out the idea that the uncontradicted evidence establishes that the plane or the instruments were not properly warmed up is a mistaken notion.

(f) The evidence of the actuator setting is the theoretical result of laboratory paperwork and there is no testimony to the effect that the angle of impact compares with the supposed setting. No such comparison was attempted.

(g) The only bad thing about the weather was a fog bank at the far end of the runway and the pilot was airborne long before he reached the fog. The jet engine does not need a warm-up.

(h) There is no evidence that the pilot attempted to fly on visual contact or on instruments or of any switch from one to another. His clearance authorized either at his own election. Kinkella did not know or testify as to what this pilot did.

(i) The throttle is not a delicate instrument [R. 520] nor can it be accidentally cut [R. 476].

Generally speaking, the attempt of Petitioner to point to contributing causes of the accident has resulted in the rankest speculations and improbable suppositions. California law requires the question of contribution to the cause of an accident to be submitted to the jury in the same manner as any other question of fact. The jury's determination of this issue is as binding upon the trial court and on appeal as any other jury decision.

C. The Decision of the Court of Appeals Does Not Conflict With the Decisions of Other Circuits on the Application of Res Ipsa Loquitur.

In each of the cases from other circuits cited by Petitioner, the distinction lies in the fact that the Court is applying the law of another State which differs from the law of California.

In the case of *Morrison v. LeTourneau Co. of Georgia* (1943), 138 F. 2d 339, the Fifth Circuit, applying the law of Georgia, refused to apply the doctrine of *res ipsa loquitur* to an airline accident involving the crash-death of a pilot and his passenger. This case is contrary to the doctrine of *res ipsa loquitur* as applied in the State of California and the Ninth Circuit.

Parker v. Granger (1935), 4 Cal. 2d 668, 52 P. 2d 226;

Smith v. O'Donnell (1932), 215 Cal. 714, 12 P. 2d 933;

Boise Payette Lumber Co. v. Larsen (1954), 214 F. 2d 373 (Sustained jury verdict for plaintiff without any actual evidence of negligence and without reference to the doctrine);

Smith v. Alaska Airways (C. C. A. 9th, 1937), 89 F. 2d 253.

In the case of *Williams v. United States* (1955), 218 F. 2d 473, the Fifth Circuit said that under the law of Florida the doctrine was only applicable to cases involving circumstances which are within the common ordinary experience of most people. The case serves to exemplify that the law of Florida differs from the law of California, but it is of no further significance.

The difference between the law of California and the law of Wyoming appears in *Colin v. United Air Lines Trans. Co.* (1937), 17 Fed. Supp. 685, wherein the District Court states:

> ". . . the law tells us that the doctrine of *res ipsa loquitur* shall not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all."

D. The Verdict Was Fair and Just and Supported by Substantial Evidence.

This is in answer to Petitioner's Point IV, page 20 of the petition which is mainly a hodgepodge of other arguments which have already been answered above.

Petitioner reverts again to the case of *McPherson v. Buick Motor Co.*, 217 N. Y. 383, 11 N. E. 1050, and repeats a completely unsound argument made in the Court below by misconstruing this case. Petitioner seems to think that to recover against a manufacturer for negligence in producing an article which is inherently dangerous if carelessly made, it must be proved that the manufacturer knew that it was defective.

Obviously negligence is carelessness in not taking reasonable precautions to prevent defects, when reasonable care would have disclosed them. The uncontradicted evidence is that there was an "*electrical fire* in the assembly." Nothing was done about it except to put out the fire and clean off the foamite, leaving no evidence of fire. But the fact that it left the very defect which originally caused the fire and which caused another when Lieutenant Hughes took the plane into the air is a fair inference.

Any possibility of negligence of General Electric in manufacturing the jet engine is precluded. Petitioner put on experts to testify with convincing certainty that there was nothing wrong with the engine and this was uncontradicted. Such testimony was necessary as a part of Petitioner's defense because the engine was not a sealed unit which could not be disassembled for inspection without destroying it. Hence, the rule of *O'Rourke v. Day and Night Water Heater Co.* (1939), 31 Cal. App. 2d 364, is not in point.

Respondents offered the Court of Appeals a reasonable explanation of the accident which was supported by the evidence and reasonable inferences to be drawn therefrom. Respondents did not indulge in speculation nor did the Court of Appeals in its decision. The only element of speculation involved is whether the jury reconstructed the event of the accident in the same way as Respondents did or came to some other equally tenable conclusion from the evidence. The Court of Appeals clearly enough adopted the same approach.

It is well to bear in mind that the evidence on some important issues of fact was substantially conflicting. In such circumstances the Supreme Court has said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture." (that accident was impossible and must have been murder). "Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only when there is a complete absence of probative fact to support the

conclusion reached does a reviewable error appear. But when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard as disbelief whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

Lavender v. Kurn (1945), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 923.

Conclusion.

The object and purpose of the petition is to gain a review of the sufficiency of conflicting evidence to sustain the verdict. No question of public interest and importance is presented. The petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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